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AN EDITORIAL

CONGESTION of court calendars and delay in reaching trial has been the major theme at meetings of judges and bar associations throughout the country. Special commissions have been appointed in a number of instances to study the problem and even magazines of general circulation have included articles on the subject.

Pretrial conferences, abandonment of the jury trial in accident claim cases, addition of more judges, a special board to determine automobile accident damages similar to the Workmen's Compensation Boards and a number of other ideas have been advanced from time to time. There appears to be a hesitation or reluctance to suggest arbitration as a remedy for the situation. The reason why is somewhat clouded, but an examination of the record will clearly indicate that there is a place for arbitration in the situation.

In 1922 when Dean Harlan F. Stone of Columbia University, later Chief Justice of the United States, Dean Frank H. Sommer of New York University, Judge Julian Mack of the Federal Court and a group of leaders of the Bar and of business, organized the Arbitration Society of America, one of the prime forces motivating that group was congestion of the court calendars in New York City. It took three to four years to reach the trial of a commercial dispute.

A little over a year ago a distinguished New York jurist, Justice Charles D. Breitel of the Appellate Division of the New York Supreme Court, speaking at a convention of shorthand reporters in Albany, New York, noted that the commercial cases that one time congested the court calendars are now being determined by arbitration and that judges rarely get interesting and important commercial cases to try. Not that they objected to being relieved of those cases, because, as many judges have stated, the use of experts in the trade

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AMONG OUR CONTRIBUTORS

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PROBLEM AREAS FOR MANAGEMENT IN ARBITRATION

Irving K. Kessler

The question posed by my assigned topic is extremely broad, embracing philosophical, procedural and substantive issues in management's relationship to the arbitration process. Clearly, no individual can speak definitively for management as a group, not only because of the varying experiences of different managements and individuals in arbitration, but also because of wide divergences in their philosophies. Recognizing this to be the case, and in order to obtain a comprehensive picture of the question, I prepared for this address by informal discussions with top industrial relations directors and arbitrators, and labor attorneys representing management in the Philadelphia area. I spoke with more than thirty, and found amazing unanimity of opinion in some areas and, as may be suspected, fundamental and clearly delineated differences in others. Some of the problems suggested are broad, while others are comparatively limited in scope, and, not surprisingly, some of the problem areas for management are not wellsprings of joy for unions.

Management is concerned, I found, with the role of the arbitrator, his integrity, and his qualifications. It was the consensus that an arbitrator is not retained as a labor relations consultant, nor as an omniscient sage to infuse the collective bargaining relationship with wisdom and perception dispensed from the arbitral fountainhead. Management men, by and large, feel that they are practitioners in a specialized field who are not only acquainted with the techniques of achieving harmonious labor relations, but are more intimately familiar with their local plant conditions, policies and personalities than the arbitrator. It is their belief that when an issue has been processed through the grievance procedure to arbitration, they want the arbitrator to render a decision rather than attempt to bring the parties together.

It is recognized, of course, that in cases involving arbitration of contract terms, it is in order for the arbitrator to mediate, since only through compromise can he achieve the bargain least distasteful to the parties. Even in occasional cases of grievance arbitration, it may be in order, where the parties indicate their receptivity, for the arbitrator to attempt to bring about a meeting of the minds. In the vast majority of cases, however, the parties are before the arbitrator only for a decision. The parties, as sophisticated bargainers, have been unable to resolve an issue and they are interested in a clear-cut finding rather than settlement through compromise.

Further, it is strongly held that questions of contract interpretation are ordinarily not susceptible to compromise settlement without violence being done to the contract itself. It can be seen from this widely-held viewpoint that dissatisfaction with the arbitrator has several roots. As suggested, these include:

1) The unfortunate tendency of some arbitrators to attempt to bring about a settlement rather than to render a decision; 2) A belief held by some arbitrators that it is their responsibility to shine the light of wisdom in the dark areas of the collective bargaining relationship and, from their Olympian heights, to bring about order from chaos; and 3) In the face of contract provisions specifically limiting their authority, arbitrators take it upon themselves to render decisions buttressed by opinions which in effect add to or modify the collective bargaining agreement.

This can vary from those situations where the arbitrator mitigates disciplinary penalty in the face of clearly spelled out and standard penalties in companies' rules and regulations to circumstances where the arbitrator finds that the contract is mute on an issue in dispute and takes it upon himself to make an interpretation which thereafter has precedent value for similar cases.

It should not be inferred from my comments that there is general dissatisfaction with either the arbitration process, or with arbitrators in general. While being cognizant of the problems inherent in arbitration and with deficiencies in some arbitrators, management generally recognizes that a grievance procedure without arbitration as its terminal point would lack vitality and effectiveness as a substitute for conflict. As a matter of fact, the mere presence of the arbitrator as a possible problem solver at the end of the road creates, in mature bargaining situations, the incentive to develop workable solutions to problems. The fear of unwise decisions or encroachment into the area of collective bargaining by the arbitrator adds further incentive to

bargain, rather than arbitrate. It is significant to note, however, that management does not regard arbitration as an extension of collective bargaining. In healthy situations it is an adjunct to the process—a safety valve rather than an arena in which to conduct further bargaining.

While considering the arbitrator as a problem to management, it should be noted that many management men find the question of multiple grievances to be a very real problem. Where grievances are arbitrated in multiple, there is the expectation on the part of some unions that the arbitrator—regardless of the merits—will call some for the union in the interest of maintaining his acceptability. As in the area of arbitration vs. mediation, it is management's expectation that an individual worthy of being called in to resolve a dispute should be a judge rather than a politician. They expect that cases will be decided upon their merits and that arbitrators will be more concerned with propriety than popularity.

In brief summary, management expects that the arbitrator, who can be and has been a real problem, should understand his role thoroughly. He should be aware of the limitations imposed upon him by the contract and by the submission agreement. He should be definitive in his findings and should buttress his award with a concise opinion outlining the thinking underlying the award. He should abstain from intervention into the collective bargaining relationship and should avoid platitudes and preachments. Above all, he should refrain, insofar as is possible, from pronouncements which have the effect of modifying or adding to the agreement.

In connection with what I like to call "the box-score philosophy," some managements have found that their unions use arbitration as a means of negotiation—operating on the assumption that if enough cases are processed to arbitration, they will win their share. This, of course, is a misuse of the process and reflects an immature or an otherwise unhealthy relationship in the plant. It is, nevertheless, a problem to a management for a union to attempt to obtain through arbitration benefits which are supplementary to those obtained through negotiations or which were unattainable through bargaining.

For example, one labor relations director informed me that his company is operating under a five-year agreement. The union is systematically challenging every paragraph of the contract. Any favorable decision by an arbitrator has immediate precedent value and, in effect, represents a gain for the union over and above the concessions won through negotiation. It is of interest that this plant is

in the third year of operation under the contract and has already enjoyed the experience of arbitrating 150 cases.

Even in those situations where there is a healthier relationship, management is concerned over the question of precedent value of decisions. In any given situation, the opinion of an arbitrator may be as the wisdom of Solomon. It is not unknown, however, for arbitrators to have "missed the boat" completely. However wise or ill-advised the findings of an arbitrator, an impression has been left on the body of the collective bargaining matter in the company which must be lived with thenceforth.

Of course, many contracts provide that prior arbitration decisions shall not be considered as precedents. Also most arbitrators hold that they are not bound by the decisions of other arbitrators on cases within or outside of the company. Yet it is an indisputable fact that the prior decision of an arbitrator, particularly in cases involving the same issue in the same company, has tremendous persuasive value during arbitration proceedings. Furthermore, it can be disruptive to good labor relations to process to arbitration a grievance on a principle which has already been arbitrated. It can thus be seen that although the arbitrator should not be part of the collective bargaining process, the manner in which he discharges his obligations has a profound effect on labor relations.

Before leaving the arbitrator as a source of management problems, there are two areas which merit discussion. One of the problems confronted by management is in obtaining properly qualified arbitrators. While many cases involving contract interpretation merely require intelligence, integrity, and insight, at least half, and possibly more, require technical background. Unless an arbitrator is grounded in timestudy, job evaluation or other areas of industrial engineering, it is most difficult for him to grasp principles—or even be aware of the impact of his findings. For example, in a piece rate arbitration in which our Company was involved, the arbitrator directed that the Company should install its piece rates, but in his award stated that "if workers are unable to achieve their previous earnings, the Company shall revise the piece rates to permit employees to achieve the former level." The award, which was fuzzy even for a college professor, was clearly unworkable, since it was an open invitation to the employees to withhold production. The Company and Union were left in much the same situation as before the award, but fortunately were able to resolve the issue.

A final body blow to arbitrators is management's belief that

they complicate life through their interpretation of past practice. Many arbitrators lend great weight to past practice as being controlling in the determination of the merits of a case. It is management's belief that where the language of a contract is clear and unmistakable and where intent is obvious, the arbitrator does not have the authority to go behind the contract language. Further, it is difficult to define past practice. In any large corporation, gaps in communication between the various levels of management are inevitable and are perhaps unavoidable. Situations exist in the plant without knowledge of executives at the policy level. Plant supervision may, and does, make deals. Isolated incidents occur which are counter to the intent of the contract. Should a single incident, or two, or three be accepted as evidence of past practice? Do isolated incidents constitute abandonment by the company of its contractual agreements? Unfortunately, more than infrequently arbitrators seize upon isolated instances as being incontrovertible proof of past practice.

It is management's belief that if practice is in conflict with the terms of the agreement, the burden of proof must lie with the union to show that both parties were aware of a deviation from the contract language and were in agreement on the abandonment of the contract. Management does not believe that the mere fact that an action has been taken in isolated cases eternally commits management to a continuation of the practice. The question of past practice, in turn, raises another question which may take its place among the headaches of management in arbitration. The question of burden of proof is a monster which raises its ugly head and breathes fire. Although I am not a lawyer, it is my understanding that under Anglo-Saxon concept of law, the accused is innocent until proven guilty. The burden of proof lies with the prosecutor to prove guilt beyond a reasonable shadow of a doubt.

In arbitration, the company is almost invariably a defendant. Should not the burden of proof rest with the union to prove its allegations? Management is on the defensive, and many times finds it difficult to refute allegations where objective data or criteria are unavailable. The burden of proof too frequently lies with management. In this connection, many of management's problems are self created. When we think of management, we think in terms of board chairmen, directors, presidents and vice presidents. However, management is also timestudy engineers, production control men, superintendents and foremen. Wide gaps in thinking, philosophy and background exist among individuals and between levels. Many cases in

arbitration are lost through mechanical failures on the part of management men down the line. These may consist of failure to keep proper records upon which to justify later disciplinary action, or to substantiate other actions affecting plant personnel such as promotions or transfers. Furthermore, management men may be lax in their responses to grievances at the lower levels of the grievance procedure. For example, few production men, unless properly trained, will present objective and conclusive data in the early steps to support their answers. Obviously a first-step answer which says "this grievance is without merit and therefore must be dismissed" is scarcely calculated to charm the aggrieved employee, his union steward, or even ultimately the arbitrator.

If every supervisor were to prepare his answers with the expectation that the information would later be read by an arbitrator, there is but little doubt that fewer cases would wind up in arbitration. The failings and inadequacies of supervision in maintaining records and handling grievances are, of course, one of management's problems in arbitration. Supervisors may also create quite a problem on the witness stand. In contests of credibility, supervisors more than union witnesses tend to vacillate and to be less affirmative. While this is obviously not an academic appraisal, it is nevertheless true that either because of their zealousness to be scrupulously fair, or because they must live with their shop personnel after the arbitration case, many supervisors tend to be weak on the witness stand. I was surprised at the number of lawyers and industrial relations directors who told me of cases lost because of weak performance by supervisors who were strong and positive in pre-hearing discussions, but who wilted on the witness stand, or recollected differently under examination.

It is already more than apparent that management is surfeited with problem areas in arbitration. There are so many points deserving discussion that, unfortunately, I am unable to give each its proper due. There are several, however, which must be mentioned. One of the problems for management lies in the area in which value judgments must be made. Management's right to manage, by and large, is accepted by unions and by arbitrators. The union, of course, reserves the right to grieve and appeal, when it believes that the exercise of the right to manage infringes upon contractual rights of employees. While recognizing the union's right to veto power, a problem is nonetheless created for management, first, in taking its initial action, and next, in justifying it—where judgment is involved. Examples of this type of problem are found in questions of relative

ability where seniority is equal or is not a factor. At what point has job content changed su.ficiently to merit a new timestudy? Should a given job receive the third or fourth degree under the complexity factor in job evaluation?

In many cases, the arbitrator is called upon to superimpose a judgment in areas where he is unfamiliar with the climate and personalities and where objective measurement is difficult—if not impossible. The effect, of course, is to reduce the flexibility of management in operations and, in many cases, to substitute the arbitrator's judgment for the foreman's. I am, of course, at this point reporting a management problem without editorial comment. Management recognizes the union's right to protest against discrimination and to seek equitable treatment for its constituents, equitable treatment in this case meaning "more." It is recognized that this area cannot be removed from arbitration and no solution to the problem has been offered. It, therefore, remains as a problem for management.

Surprisingly, I did not find that the question of management prerogative constituted much of a problem in arbitration. There is much sound and fury concerning management prerogative, but I suspect that the problem is greater for unions than for companies, since it is generally held that all rights which have not been specifically altered by contractual agreement continue to be residual in management. This is appalling to many of the men on the other side of the table, but despite many lamentations of encroachment by unions into the sacred domain of management, this is apparently not a major problem in arbitration.

There are two additional substantive areas which are continuing headaches, however. One is the area of discipline, and the second, management's right to subcontract. I must give more than passing attention to the serious disruption of discipline within a plant through misguided benevolence by arbitrators. When a contract clearly spells out that the penalty for fighting is discharge, it is certainly beyond the arbitrator's authority to change the agreement by saying "this man should be disciplined, but discharge is too harsh."

Some extent of the impact of findings of arbitrators on plant discipline may be gained from a study by Professor J. N. Porter, Jr., Professor of Psychology, Rensselaer Polytechnic Institute (*The Arbitration of Industrial Disputes Arising From Disciplinary Action*), as reported to the Industrial Relations Research Association in 1949. Professor Porter found, in a study of 197 arbitration awards in which the issue was the equity of discipline, that arbitrators in only 38%

of cases sustained the disciplinary action taken by management. In 121 cases, which was 62% of the total, the arbitrator either revoked or modified the discipline imposed by management. In 49% of the 121 cases, the arbitrator completely revoked management's action, and in 51%, he reduced the severity of the discipline.

This was Professor Porter's conclusion:

> "We may tentatively conclude from this preliminary study that secondary motivations are of real significance in the arbitration of industrial disputes which arise from disciplinary action. That both parties are significantly influenced by considerations of status, and that the union is additionally influenced by consideration of group loyalty also seems apparent. The operation of these needs interferes with sound function of the disciplinary process and the arbitration of disputes arising therefrom. The arbitrator, in turn, often has a tendency to go beyond the authority contractually vested in him to ascertain proper cause and non-discrimination, and substitutes his judgment for that of management in determining the appropriateness of the discipline meted out."

It seems clear that if rules have validity, because of their fairness and long acceptance, the arbitrator should not disregard the terms of the contract.

Time does not permit a thorough-going discussion of another of the substantive problems in arbitration. However, increasingly, unions are challenging the right of management to subcontract work —even in the absence of limiting clauses. Sub-contracting is an integral part of our industrial system and even such giants as General Motors and Ford may find it difficult—if not impossible—to produce without subcontractors. Without being stuffy, in the use of a much overworked phrase—management must have the prerogative to determine where and how it will produce its products, or obtain its services, unless they bargain away their right and responsibility. It is the belief of management that unless its actions in subcontracting are modified by anti-union bias, absent a bar in the contract, the company should have the unrestricted right to subcontract work.

No discussion of problem areas for management in arbitration would be complete without touching upon the unfortunate tendency of many unions to process matters to arbitration for political reasons. We are all aware of cases without merit which have been processed through arbitration merely to save face, or for other political considerations. This is an unfortunate abuse of the arbitration process

which is wasteful of time and effort. It is not only a nuisance to management in arbitration, but it is also disruptive of labor relations in the plant, since it is indicative of a lack of interest in solving problems. The processing of grievances to arbitration for political reasons may breed a distrust in the work force in arbitration and can only serve to worsen labor relations within the plant.

It is, of course, understandable that in mature relationships a case will be processed with the awareness of both parties that the case is without merit. The parties are nonetheless at the mercy of an arbitrator and more than a few such cases have been awarded to the union to the mutual discomfiture of both parties. In mature situations, it may be held that arbitration for the purpose of saving face is better than a work stoppage. I cannot argue with this—my argument is with the procession of ill-advised cases processed either for political reasons, or in accordance with a box-score philosophy.

I know of at least one plant in which the problem was solved by a grievance review committee which analyzed all cases carried beyond the first step—taking the committeeman off the hook by giving him the opportunity to say "the grievance was turned down by the review committee."

My list of problem areas for management in arbitration is long and, of course, the problem areas vary in weight and impact. I do not wish to leave the impression that management is desirous of abandoning arbitration. It is, by far, the most workable technique developed to date for the resolution of grievances. Utilized properly and in a mature bargaining relationship, it is invaluable for resolving those honest differences of opinion which arise in even the soundest of relationships. Awareness and honest analysis and discussion of problems often lead to their mitigation and to a healthier situation. Our chief problem is not to find a substitute for arbitration, but to develop ways and means to make it operate more effectively.

TREATY LAW OF PRIVATE ARBITRATION*

S. A. Bayitch

It is not surprising to find that private arbitration presents a host of intricate legal problems.[1] The agreement to settle a controversy out of court by means of private litigation and adjudication raises, first of all, the question as to what law will control its coming into existence. The agreement to arbitrate, according to all appearances, looks like any other private transaction based on consent and may as well be governed by the law of the place of making, with the qualification added, not unusual for contracts, that the law of the place of performance—in this case the law of the place where the arbitral proceedings shall take place—also be taken into consideration. While this approach follows the view that the arbitration agreement is an independent transaction and, as such, entitled to have its own *lex causae,* a different analysis is possible, namely to visualize the agreement to arbitrate as a mere collateral clause annexed to the basic transaction and, consequently, to claims arising out of it. This latter analysis would support the view that the same law should control the underlying transaction as well as the agreement to arbitrate disputes arising out of it.

However, the agreement to arbitrate may be construed not as contractual in nature but as jurisdictional, designed to "oust the court of jurisdiction."[2] Such "surrender" of judicial jurisdiction[3] would affect, under this view, not only the public interest in having

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* This article is based on the author's "Conflict Law in United States Treaties," 8 Miami Law Quarterly 501 seq. (1954), recently published by the University of Chicago (1955). The latter is cited in notes.

1. Balladore-Pallieri, L'arbitrage privé dans les rapports internationaux, 51 Recueil de cours 291 (1935); Marmo-Migliazza, L'unificazione delle norme di diritto internazionale privato in materia di arbitrato, in Atti del convegno internazionale per la riforma dell'arbitrato 73 (1955); Stern, The Conflict of Laws in Commercial Arbitration, 17 Law & Cont. Pr. 567 (1952); Morelli, Il diritto procesuale civile internazionale 226 (1938); Brachet, Clause compromissoire et sentences arbitrales, in 3 Lapradelle-Niboyet, Répertoire 448 (1929).
2. Kill v. Hollister, 1 Wils. 129 (1764).
3. A similar attitude is displayed by Italian authors considering arbitration to be "deroga della giurisdizione" (Atti . . . 80) and as such "equivalente giurisdizionale," all this in view of the restrictive Art. 2 of the Italian Civil Code.

disputes (primarily or exclusively) decided by courts of competent jurisdiction, but also, particularly in situations where jurisdictional prerogatives of different countries are involved, the jurisdictional sovereignty of different nations. Where this attitude prevails, it may be expected that the question of jurisdiction will be subjected to a close scrutiny. Two basic issues are involved here: that of arbitrability of the dispute, and the other, the power to render an award. The arbitrability may be determined in two ways: ordinarily according to the law of the forum *arbitrationis,* and, particularly in international situations, also according to the law of the forum *executionis.* The test of jurisdiction may be, on the other hand, only a limited one, e.g., apply in situations where the jurisdiction of the forum *executionis* was ousted; or, expanded into a universalistic test, against jurisdictional standards of any country whose jurisdiction (according to its own jurisdictional norms and general principles of international law) would have otherwise (but for the arbitral agreement) come into play.

It is only natural that this latter approach relies heavily on the argument that arbitration is intended to result in a judgment-like decision of the dispute which decision will have to be, in the final analysis, enforceable by courts. In addition, parties not only expect that such "last resort" will always be available to give effect to private adjudications, but also rely on a more or less penetrating judicial supervision if called for, of course, of such private litigation, in order to effectuate their agreement and to prevent what may be called a miscarriage of private justice. It is generally accepted that the judicial supervision of private arbitration will be governed by the law of the place where such proceedings take place. As to the enforceability of the award, local law applicable will determine whether the award is valid and enforceable and if so, how. However, in international situations the question of enforceability of awards in another country will not depend exclusively on the foreign *lex loci arbitrationis,* but will be decided, to a considerable extent, by the law of the forum where such award is sought to be recognized and enforced, i.e., by the *lex fori executionis.*

This outline of some of the basic problems is, of course, intended only to set the stage for the discussion of applicable treaty law of the forum where such award is sought to be recognized and law and what problems have not been resolved.

As in all matters of private law, treaties may adopt one of the two possible courses of action. One is to unify conflict of law rules governing the matter and acquiesce to the persistent diversity of

national legislations; the other is to unify the substantive as well as the adjective law and, by so doing, dispense with the necessity to provide for conflict of law rules. In spite of many a valiant effort to unify, by means of international cooperation,[4] the substantive and procedural law of arbitration, the first method still prevails. It is also followed in the United States.

Since 1945 some of the important conflict of law aspects of private arbitration have been dealt with in treaties of friendship and commerce to which this country is a party.[5] Their provisions regarding arbitration fall mainly into two categories. One, the older, following more conservative methods, is adopted in treaties with Ireland, Colombia, Israel, Denmark, Italy, Haiti and Iran. These treaties only slightly affect domestic law as it stands, by removing two of the possible grounds against the enforcement of agreements and awards. The other type of treaty law goes farther and accords awards, within the limits to be discussed, international recognition. This type is represented by treaties with Greece, Japan and West Germany.

4. Lorenzen, Commercial Arbitration—International and Interstate Aspects, 43 Yale L.J. 716 (1934); Nussbaum, Treaties on Commercial Arbitration, a Test of International Private Law Legislation, 56 Harv. L.Rev. 219 (1942), also 4 Archiv des Völkerrechts 385 (1954); David, Rapport sur l'arbitrage conventionnel en droit privé (1932); Macassey, International Commercial Arbitration, Its Origin, Development and Importance, 24 Transactions of the Grotius Society 179 (1938); Carabiber, Le development de l'arbitrage commerciale internationale, 3 Revue Hellénique de Droit International 205 (1950); Schoenke, Der gegenwärtige Stand und der weitere Ausbau der internationalen Schiedsgerichtsbarkeit in Zivil-und Handelssachen, 3 Sueddeutsche Juristen Zeitung 186 (1948); Riezler, Internationales Zivilprozessrecht 600 (1949). Note also, Alcala-Zamora y Castillo, Estudio y bibliografia sobre arbitraje de derecho privado, 4 Revista de la Facultad de Derecho (Mexico) 97 (1954); Carreras, Contribucion al estudio del arbitraje, ensayo de derecho comparado, 1 Revista del Instituto de Derecho Comparado (Barcelona) 118 (1953); Cohn, Commercial Arbitration and the Rule of Law, a Comparative Study, 4 Univ. of Toronto L.J. 1 (1941).

Among recent drafts, the following should be mentioned: International Institute for the Unification of Private Law (Rome) 1954—Draft III (3); the Interamerican draft (Inter-American Juridical Committee, Uniform Law on International Commercial Arbitration), 10 Arb. J. 94 (1955); the draft submitted by Professor Sauser-Hall to the Sienna Conference (1952) of the International Law Institute (see Atti 413); and the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards on which the Economic and Social Council of the United Nations recently invited comment (Resolution 570 of May 20, 1955).

5. These treaties are: with China (1946, Art. VI, 4, TIAS 1871); Ireland (1950, Art. X); Colombia (1951, Art. V, 2); Greece (1951, Art. VI, 2, TIAS 3057); Israel (1951, Art. V, 2, TIAS 2984); Denmark (1951, Art. V. 2), Italy (supplementary agreement, 1951, 25 Dep't State Bull. 568); Japan (1953, Art. IV, 2, TIAS 2863); West Germany (1954, Art. VI, 2); Haiti (1955, Art. V, 2) and Iran (1955, Art. III, 2). Added Treaties and International Agreements Series (TIAS) publication indicates ratification on the part of the United States.

Two treaties (with China and Iran) show special characteristics and will be discussed separately.

All these treaties have one requirement in common: in order to come within the coverage of treaty law, there must be *diversity of nationality* of the parties to the arbitral agreement (". . . between nationals and companies of one Party and nationals and companies of the other Party"), residence or domicile being, for obvious reasons, unsuitable for purposes of bilateral treaties.[6] The question of *arbitrability* is generally left to be decided under the locally applicable law;[7] the question is mentioned in the treaty with China, without any indication as to the controlling law. A similar hands-off attitude also prevails in regard to *formalities* common under a great many domestic laws (e.g., writing, notarial act, etc.); the only exception is the treaty with China requiring "a written agreement for arbitration," a rule excluding from the coverage of the treaty oral agreements, even if sufficient under domestic law.

In a general way, it may be stated that treaties in force have no positive rules as to what law governs the *effects of an agreement to arbitrate,* particularly the question of its specific performance. With two exceptions (China and Iran) treaties eliminate only two possible grounds which may, under the applicable domestic law of the country where enforcement of the agreement is sought, justify a denial to enforce an agreement entered into within the other contracting country.[8] One of these grounds is the fact that the arbi-

6. Nationality as contact was adopted in the original draft for the Geneva Protocol (1923) but was later changed to "subject to jurisdiction" which formula was also used in the Geneva Convention (1927).

7. These treaties are not, at least expressly, limited to "commercial" matters, a criterion important in the Geneva Protocol (Art. I); however, it is interesting to note that in reports accompanying their submission to the Senate, these provisions are designated as referring to "commercial arbitration." The treaty with Iran refers to disputes of a "civil nature."

8. The language used in these treaties (except in the one with Colombia) refers, in regard to the enforceability of the arbitration agreement, only to the "*other* Party," i.e., to the country where the agreement was not entered into but is sought to be enforced. Consequently, the effect of this treaty provision is limited to the latter country. On the contrary, the law of the country where the arbitration agreement was made, remains unaffected; this means that a denial of enforceability of the agreement on any ground, including that of the place of arbitration and the alienage of arbitrators, will prevent the coming into existence of such an agreement. This cannot be cured by the treaty provision ordering the "other Party" to enforce such an agreement, because such provision affects only the latter country's domestic law. The only treaty with a bilaterally operating rule is the treaty with Colombia providing that arbitration agreements shall not be held unenforceable in the territories of "*either* Party." Such a provision, of course, will supersede contrary domestic law in regard to both grounds mentioned before, in both contracting countries.

tration should take place abroad,[9] and the other that "the nationality of one or more of the arbitrators is not that of such other Party."[10] It follows that all other grounds, including the rule of revocability, will remain in force, provided it is part of the locally applicable law. A different provision is to be found in the treaty with China; it states that such agreements "shall be accorded full faith and credit by the courts within the territories of each Party."[11] On the contrary, the treaty with Iran contains only a broad policy declaration, stating that "private settlement of disputes of a civil nature . . . shall not be discouraged within the territories of the other High Contracting Party."

9. The provision may have been prompted by The Silverbrook (18 F. 2d 144, 1927), where it was held that federal courts are "without jurisdiction to direct parties to proceed to arbitration . . . because the place . . . of arbitration . . . (is) beyond the jurisdiction of the court (i.e., in London)." Recent statutory changes (9 U.S.C., Sec. 3, 1952) were given effect in International Refugee Organization v. Republic S.S. Corp., 93 F. Supp. 798 (1950), in the sense that "a provision for arbitration outside the United States is valid."

10. These provisions have been inserted on the basis of an information received by the Foreign Relations Committee of the Senate (". . . there have been cases in which courts have been unable to give effect to arbitration provisions because of domestic requirements relating to the nationality of arbitrators (and) of the place where the arbitration occurs," Report of the Committee concerning the Treaty with Ireland, 1951, 81st Congr., 2d Sess., Exec. Rep. 8). However, the prevailing majority of countries, including the United States, follow the non-discriminatory rule. This goes now also for Spain, in consequence of art. 23 of the Spanish Arbitration Act of 1952 (cf. Carreras, Estudio comparativo de la ley española de arbitraje, 3 Revista del Instituto de Derecho Comparado, Barcelona, 104, 1954). Though Latin American countries here referred to adhere to the opposite rule, a spot check reveals that this is not generally the case. Colombia, for example, does not prohibit alien arbitrators (Art. 240 and 1216 of the Judicial Code and Art. 1504 of the Civil Code, cf. Sanz Araos, Arbitramento civil 61, 1952; and Morales, Curso de derecho procesal civil 52, 1951) which makes the respective treaty provision misplaced. The same rule prevails, e.g., in Argentina, Mexico, Honduras, Peru, etc. However, the requirement that arbitrators be in full possession of "derechos civiles" is adopted in a great majority of these countries; this would make aliens eligible where they are, according to constitutions, equalized with the natives (e.g., Peru, Art. 551 of the Code of Civil Procedure, in connection with Art. 15 of the Constitution; cf. Aparicio y Gomez Sancho, Codigo de procedimientos civiles 110, 1947). A universalistic approach is adopted in Guatemala (Art. 735 of the Code of Civil and Commercial Procedure) barring from becoming arbitrators those who "esten privados del ejercicio de los derechos de su respectiva ciudania." On the contrary, nationality is required e.g., Brazil (Art. 1031,3 of the Code of Civil Procedure); also in Italy (Art. 812 of the Code of Civil Procedure).

    Recent drafts support, of course, the liberal view, e.g., the second Inter-American draft (1955, see note 4), Art. 7; also art. 11 of the UNIDROIT draft, ibid. "The nationality of an arbitrator shall not be taken into account."

11. "Each" being interpreted in the sense of the Party where the agreement was made. See also note 17.

Whether or not an arbitral award rendered in one country will be *enforced* in the other, depends, generally, upon the locally applicable law.[12] In this respect, treaty law in force in this country may be divided into three groups. According to the majority of treaties (with Ireland, Colombia, Israel, Denmark, Italy, Haiti and Iran), local law remains virtually unchanged, except that the same two grounds already mentioned with respect to arbitral agreements are eliminated also as possible grounds, under local law, to deny the enforcement of awards rendered in the other contracting country (". . . shall not be deemed invalid or denied means of enforcement"), provided such awards are "final and enforceable under the laws of the place where rendered." In plain language, this means that even if an award is final and enforceable under the law of the place where rendered, it will not be enforced in the other contracting country if, according to the locally applicable law there, other grounds should justify such denial.

The second type of treaty law is represented by the treaties with Greece, Japan[13] and Germany. There, no mention is made, in this respect, of both the grounds just discussed. On the contrary, a positive rule is adopted that awards made in accordance with the agreement to arbitrate ("pursuant to any such contract") and "final and enforceable under the laws of the place where rendered," shall be "deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party." Such awards will be "declared enforceable by such courts, except where found contrary to public policy"; then, they will be "entitled to privileges and measures of enforcement appertaining to awards rendered locally," meaning that such awards will be given what is called national (equal) treatment, and enforced by all methods of enforcement available to awards rendered locally. In all treaties of this type an important exception is established in favor of the United States. Awards enforceable under these treaties "shall be entitled in any court in any State only to the same measure of recognition as awards rendered in other States (of the United States),"[14] a standard of

12. Domke, On the Enforcement Abroad of American Arbitration Awards. 17 Law & Cont. Pr. 544 (1952); Heilman, The Enforceability of Foreign Awards, 3 Arb. J. 183 (1939); Lorenzen, Commercial Arbitration: Enforcement of Foreign Awards, 45 Yale L.J. 93 (1935).
13. See Tanaka, Enforcement of Arbitration Awards in Japan, 10 Arb. J. 88 (1955).
14. It may be added at this point that this provision applies to state as well as to federal courts, the latter having concurrent jurisdiction in matters of treaty law, provided other jurisdictional requirements are met.

treatment comparable to the internal out-of-state treament.

All treaties listed above guarantee, within limits just stated, that awards will be enforced in both contracting countries (". . . within the territories of either Party"), i.e., in the country where such awards have been rendered as well as in the other contracting country, irrespective of domestic law to the contrary. Consequently, the privilege is not limited to international situations (award rendered in one, to be enforced in the other contracting country) but covers also intrastate and inter-state situations where, in addition to all prerequisites listed above, there is diversity of nationality. However, the procedure to be followed under local law in regard to the enforcement of awards remains unaffected. Where, according to local law, an action is to be brought upon an award or some kind of *"delibazione"* is required, treaty law brings no changes.[16]

The third type in regard to enforcement of awards is the one adopted in the treaty with China. It provides that awards be given "full faith and credit[17] by the courts within the territories of the High Contracting Party in which (they were) rendered, provided the arbitration proceedings were conducted in good faith and in conformity with the agreement to arbitrate."[18]

In addition, there is another treaty containing important provisions on private arbitration, the Warsaw Convention on International Air Transportation of 1929, 49 Stat. 3000. In a general way, Art. 32 of the Convention denies effect to "all clauses contained in the contract (i.e., of air transportation), and (to) all special agreements . . . altering the rules as to jurisdiction" including agree-

15. See Conflict Law in United States Treaties 24 (1955).
16. The supplementary agreement with Italy (note 5) restates in Art. VI the same rule, namely, "It is understood that nothing herein shall be construed to entitle an award to be executed within the territories of either High Contracting Party until after it has been duly declared enforceable therein," a precaution understandable in view of Art. 796 seq. of the Italian Code of Civil Procedure. Cf. Sperl, Die buergerlichen Schiedssprueche nach dem Rechte der italienischen Zivilprozessordnung vom 28. Oktober 1940, 16 Annuario di Diritto Comparato 52 (1943); Marmo, Gli arbitrati stranieri e nazionali con elementi di estranietà, 19 Annuario di Diritto Comparato 1 (1946); also, Vassia, International Commercial Arbitration from the Italian Viewpoint, 4 Arb. J. 27 (1947), and Racca, Enforcement in Italy of Awards Between Americans and Italians, 6 Arb. J. 235 (1951).
17. The term "full faith and credit" is used here, probably, in a non-technical sense since it cannot be assumed that equality was intended through this treaty rule, between awards and judgments on the interstate (or even intrastate) level.
18. The second Interamerican draft (note 4) reads that "awards have the force of a final judgment. Their execution may be enforced in the same manner as judgments of a court", which provision prompted the U.S.

ments to arbitrate.[19] This rule, however, is qualified by two far reaching exceptions. On the one hand, it does not affect the arbitration of claims arising out of the transportation of goods, regardless of time when the agreement to arbitrate was made (before or after "damage occurred"), provided arbitration "is to take place within one of the jurisdictions referred to in the first paragraph of Art. 28," i.e., within the territory of one of the contracting countries, or, at the option of the plaintiff, in one of the jurisdictions enumerated in the same Art. 28 of the Convention.[20] On the other hand, agreements to arbitrate claims arising out of the transportation of persons is limited: future disputes in the sense of future claims ("before damage occurred") may not be made subject to arbitration. Nevertheless, agreements to arbitrate such claims will be effective if concluded after "damage occurred." It is to be pointed out, finally, that according to an express provision of the Convention, all this arbitration is "subject to the Convention," meaning that in matters controlled by the Convention there is no possibility for an amiable composition (as a sort of arbitration) in violation of the Convention, nor will an award stand if rigid provisions of the Convention are not given effect, since any violation of these rules makes the awards void.

It may be added that the Interamerican system of commercial arbitration established by Resolution XLI of the Seventh International Conference of American States (Montevideo, 1933) is "entirely independent of official control." A private machinery of arbitral tribunals is set up and no treaty law created to streamline the law under which it operates. Consequently, domestic law will determine what law controls.[21]

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representative to state ". . . which it is not." However, it is to be kept in mind that this provision is in line with a tradition among Latin American countries of long standing. The initial step was taken in the Montevideo Convention on International Procedural Law (1889, Art. 5 and 6) granting awards the same effect abroad as in the country where rendered; the rule was changed so as to give full equality in the Havana Convention (Codigo Bustamante, 1928, Art. 423, 432) reserving only the question of arbitrability to the *lex fori arbitrationis*. This principle of equality was adopted in the Montevideo revision (1940, III, Art. 5).

19. Goedhuis, National Airlegislation and the Warsaw Convention 311 (1937).
20. For details see Conflict Law in United States Treaties 33 (1955).
21. Domke-Kellor, Western Hemisphere Systems of Commercial Arbitration, 6 Univ. of Toronto L.J. 307 (1946); Domke, Interamerican Commercial Arbitration, 4 Miami L.Q. 425 (1950); Goico, Evolucion del arbitraje comercial en America. 21 Revista de la Secretaria de Estado (Dominican Republic) 14 (1952); Barrios de Angelis, El arbitraje en America, 3 Revista de la Facultad de Derecho (Montevideo) 767 (1952); Davila, Arbitration in the Western Hemisphere, in Proceedings, International Trade Arbitration Conference (New York, 1955) 20 (1955).

ARBITRATION OF LOAN DISPUTES UNDER FRENCH LAW

Georges R. Delaume

The many advantages of arbitration in the settlement of international loan disputes are well known.[1] Yet, despite these advantages, French law has, until recently, viewed arbitration agreements askance. A recent decree-law of May 20, 1955,[2] may mark the beginning of a more receptive attitude towards the use of arbitration as a means of settling disputes, at least in the field of international lending.

Until the decree of 1955, rather than encouraging arbitration settlement, French law sought to increase the grounds for jurisdiction of the French courts in order to afford holders of foreign bonds a French forum in which to bring their claims. Thus, a holder of foreign bonds who is a French national might claim the benefit of article 14 of the Civil Code, granting to any French citizen the privilege of suing his foreign debtor before the French courts, even though the debtor is a foreign resident or domiciliary and the transaction involved took place in a foreign country.[3] For example, a French holder of bonds issued in the Netherlands by an American company could sue the debtor company in France for enforcement of a gold clause in the bonds.[4] Moreover, under French statutes, any

1. See e.g., Domke, "Arbitration Clauses and International Loans" 3 Arb. J. 161 (1939); League of Nations, *Report of the Committee for the Study of International Loans*, May 12, 1939 (Official No. C. 145, M 93, 1939. II.A., pp. 25 et seq., 38 et seq.). Comp. Coudert and Lans, "Direct Foreign Investment in Undeveloped Countries—Some Practical Problems," XI Law and Contemporary Problems, Summer 1946, pp. 758-9.

2. Journal Officiel May 22, 1955, p. 5150.

3. On article 14 Civil Code in general see Delaume, *American-French Private International Law*, Bilateral Studies in Private International Law, Study No. 2, Col. U. 1953, pp. 56-57.

4. Tribunal Civil Seine March 27, 1935, Société Financière, Commerciale et Industrielle v. Bethlehem Steel Company and Bethlehem Steel Corporation,

holder, regardless of his nationality, of bonds issued in France by a foreign entity might bring suit on the bonds before the French courts.[5] The sweeping character of these provisions is apparent when one notes that they both apply to suits against political subdivisions of a foreign government as well as foreign companies. Political subdivisions, including provinces or states, members of a federal state, do not enjoy in France any jurisdictional immunity; they can be sued before the French courts either on their bonds issued in that country or on the basis of article 14 of the Civil Code.[6]

The effectiveness of such jurisdictional remedies is questionable. Indeed, it is doubtful whether any effective protection of foreign bond holders can be achieved simply by increasing the list of already numerous grounds for the jurisdiction of the French courts. For example, it is obvious that if the cost of litigation in France is not commensurate with the financial interests involved (as is usually the case with the individual bondholder unless his action is in the nature of a "test case" with outside financial backing), no action is likely to be brought before the French courts. Moreover, if the foreign issuer has no assets in France, little will be gained by obtaining a French judgment which for all practical purposes will be unenforceable against him in France and is likely to be denied recognition and enforcement in the issuer's country. Practical considerations such as these are not to be minimized, nor can one ignore, legal factors which greatly limit the usefulness of the above remedies.

One such limitation is the jurisdictional immunity enjoyed by

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Journal du Droit International Privé (hereinafter Clunet) 1936, 590. In this connection it is noteworthy that, although French holders of foreign bonds may waive their jurisdictional privilege (for instance by adhering to a clause in the bonds or the prospectus conferring jurisdiction upon the courts of a foreign country), such a waiver is not easily acknowledged by French courts (see e.g., Cass. June 20, 1932, S.A. Crédit Foncier et Agricole de l'Etat de Minas Geraes v. Marquet, Sirey 1932-1. 286, Dalloz 1935.2.25). Indeed, the only reported case known to the writer in which a French holder of foreign bonds was deemed to have waived his jurisdictional privilege is a case in which he was the assignee of a foreign holder who had expressly agreed to an arbitration clause in the bonds (Cass. July 12, 1950, Montané v. Cie. des Chemins de Fer Portugais, Revue Critique de Droit International Privé (hereinafter Revue) 1952, 509, Clunet 1950, 1206, Sirey 1952-1. 41).

5. Law of July 11, 1934 and Decree-Law of October 30, 1935 (art. 57). See G. R. Delaume, "Les Conflits de Juridictions en Matière de Sociétés," Juris-Classeur Périodique (hereinafter J.C.P.) 1950, I, 849.

6. See e.g., Cass. October 24, 1932, Etat de Clara v. Dorr, Clunet 1933, 644, Dalloz 1933.1.196. See also Court of Appeal of Paris June 19, 1894, Ville de Genève v. De Civry, Dalloz 1894.2.513; Tribunal Civil Seine March 2, 1948, Dumont v. Etat de l'Amazone, Dalloz 1949, 428. Comp. Art. 99 of the Draft of a Codification of French Conflict of Laws (as translated by Nadelmann and von Mehren in "Codification of French Conflict Law," 1 Am. J. Comp. L. 404, 429 (1952)).

foreign sovereigns. Holders of foreign governmental bonds cannot maintain an action in France against the debtor government (as distinguished from its political subdivisions),[7] unless the latter has voluntarily submitted to the jurisdiction of the French courts by waiving its immunity either in court or in advance as, for example, by express stipulation in the bonds or other loan documents.[8] Even a waiver of immunity is of doubtful value, however, since it does not import a waiver of immunity from execution. Hence, a French judgment could not normally be executed on the debtor's assets, if any, in France.[9]

For all practical purposes, therefore, the type of jurisdictional protection accorded by French law to holders of foreign bonds, because of its limitations, is not altogether satisfactory.[10] The large number of French gold clause judgments which have remained unexecuted is sufficient testimony to this fact.

The only practical solution is, of course, to authorize and encourage settlement by arbitration of disputes between holders of foreign bonds and their foreign debtors. However, until the new decree-law of 1955, recourse to arbitration was impossible because of the restrictive judicial interpretation given to the decree-law of October 30, 1935 providing for the compulsory grouping of bondholders into

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7. See e.g., Cass. Nov. 20, 1934, Gouvernement du Maroc v. Laurans, Revue 1935, 795, Sirey 1935.1.31. See also Tribunal Civil Seine December 30, 1930, Banque Ottomane et Société Financière d'Orient v. Philippe, Clunet 1931, 1040. This remark holds true when the jurisdiction of French courts is based on the French nationality of the plaintiff. Article 14 Civil Code is inapplicable to suits against foreign sovereigns (see e.g., Cass. January 22, 1849, Lambèze et Pujol, Dalloz 1849.1.10; Court of Appeal of Paris January 7, 1955, Gugenheim v. Etat du Viet Nam, J.C.P. 1955, II, 8569). On the French doctrine of immunity and its limitations, see Brandon, "Sovereign Immunity of Government Owned Corporations and Ships," 39 Cornell L. Q. 425 (1954); Hamson, "Immunity of Foreign States, the Practice of the French Courts," 27 Brit. Year Book Int'l L. 293 (1950); Niboyet, 6 *Traité de Droit International Privé, Français* (Paris 1949), p. 324 et seq.; Batiffol, *Traité Elementaire de Droit International Privé* (2nd ed. Paris 1955) pp. 780 et seq.; Freyria, "Les Limites de l'Immunitv de Juridiction et d'Exécution des Etats Etrangers," Revue 1951, 207 et seq.; 449 et seq.

8. See e.g., Tribunal Civil Seine April 10, 1888, Rochaïd-Dahdah v. Gouvernement Tunisien, Clunet 1888; June 30, 1891, Ben Aïad v. Bey de Tunis, Clunet 1892, 952, See, however, Cass. Nov. 1934, cited in the foregoing note. The American reader will be interested to note that such a waiver, once made in the bonds or the loan instruments, is irrevocable.

9. See e.g., Court of Appeal of Aix November 23, 1938, Socifros v. U.S.S.R., Revue 1939, 303; Castel "Immunity of a Foreign State from Execution—French Practice," 46 Am. J. Int'l. L. 520 (1952); Freyria, op. cit. in note 7.

10. As a last resource, bondholders may, of course, seek the assistance of the French Government or its diplomatic protection, but this remedy, which has sometimes proved useful (see e.g., The Serbian and Brazilian Loans Cases decided in 1929 by the P.C.I.J., Series A Nos. 20/21), is subject to such political considerations that it is of doubtful general utility.

associations with defined powers.[11] This decree lists certain matters which can be passed upon be resolution of the association and other matters which can be settled only by agreement of the individual bondholder. Since neither list exhausts the possible areas of dispute, it rested with the courts to decide whether matters not specifically mentioned could be acted upon by the association or only by the individual bondholder. When first faced with this question, the courts tentatively favored the first alternative, but finally settled upon the second and more restrictive solution. It is now well established that associations enjoy no other prerogatives than those expressly conferred upon them by the decree. A dramatic illustration of the above is found in a recent judgment of the French Supreme Court quashing a resolution of an association waiving the benefit of a gold clause in bonds issued in France by a Syrian company because such a waiver was not specifically authorized by the decree of 1935.[12] A similar construction undoubtedly would have prevailed had a resolution approving arbitration been in issue, although no case in point has been found.[13]

This unwarranted construction of the decree of 1935, together with the limitations on the jurisdictional remedies described above, prevented holders of foreign bonds from obtaining any practical settlement of their claims. The decree-law of May 20, 1955 is intended to remedy this situation. This new provision reads in part as follows:

> "In case of any dispute between holders of bonds or of evidences of indebtedness [e.g., notes or other types of obligations] and a foreign collectivity, the general assembly [of a bondholders' association] may pass a resolution submitting the dispute to arbitration. . . . The resolution submitted to the assembly shall specify the subject matter of the arbitration."

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11. There still exists in France another kind of association voluntarily created before the decree of 1935. The powers belonging to such associations are defined in their respective charters, and, if there is in the charter a provision authorizing arbitration, there is no reason why the association could not resolve to arbitrate a dispute between its members and a foreign debtor. See in general, M. Domke, "Arbitral Clauses and Awards—Recent Development in French Law," 17 Tulane L. Rev. 447 (1943). On the decree-law of 1935, see Moreau, I *La Société Anonyme* (2nd ed. Paris 1955), pp. 905 et seq.; Hamel et Lagarde, I *Traité de Droit Commercial* (Paris 1954), pp. 835 et seq.; Ripert, *Traité Elementaire de Droit Commercial* (3rd ed. Paris 1954) pp. 540 et seq.

12. Cass. March 10, 1954, Société Tramways et Electricité de Damas v. Caumartin, Dalloz 1954, 489, Sirey 1954.1.153, Revue des Sociétés 1954, 157.

13. The preamble to the new decree-law of May 20, 1955 reads in part as follows: "[the restrictive judicial construction of the decree of 1935] forbids to general assemblies of bondholders [associations] to deliberate validly on a proposal for arbitration settlement. . . ."

This welcome provision constitutes an official recognition of the merits of arbitration in a field in which jurisdictional remedies are likely to prove deceiving.[14] So much the more, since the scope of this provision is not limited to disputes between bondholders and foreign sovereigns, but also includes disputes with nonsovereign public entities, such as municipalities or provinces, which, unlike foreign sovereigns, are amenable to the jurisdiction of the French courts.[15] In both cases, therefore, arbitration settlement is now possible.

Since the decree provides for recourse to arbitration in cases in which jurisdictional remedies are already available, the question arises whether arbitration is also permissible in the case of disputes between bondholders and foreign private issuers which, under French law, would not come within the scope of the term "foreign collectivity" used in the decree. Take, for example, the gold clause dispute between the French holders of bonds issued by the Bethlehem Steel Company, which was litigated before the French courts in the thirties. Were the same dispute to arise today, could the French bondholders' association resolve to submit the dispute to arbitration instead of going to court? Much as one may regret it, the answer to this question is not as yet entirely clear. It will depend upon the judicial construction of the new decree-law. If the courts construe this provision as restrictively as they did the decree of 1935, it is not unlikely that they will hold that, in the absence of express reference in the 1955 decree-law to disputes between private parties, bondholders' associations do not have the right to submit disputes to arbitration. On the other hand, the preamble to the decree-law of 1955 would seem clearly to show an intent to repudiate the restrictive judicial construction of the previous statutory law.[16] It would seem reasonable therefore, to hope that the courts will hold that the new decree-law expresses a general principle applicable to cases other than those to which it expressly refers.

14. The preamble also states: "Arbitration is the only procedure at the disposal of bondholders to seek satisfaction of their claim when the debtor is a *foreign public collectivity* which refuses to comply with a French judgment in favor of the bondholders. . . ." "Under the circumstances, and in order to facilitate the satisfactory solution of many disputes, it appears desirable, in cases of disputes between bondholders and a *foreign collectivity*, to confer upon the general assembly of bondholders [associations] the authority to pass upon a resolution to arbitrate" (underscoring added, see note 15).
15. The expression "foreign collectivity" or "foreign public collectivity" (in French *collectivité publique étrangère*), used in the decree-law and in the preamble, has always been construed as referring to any kind of foreign public entity, either sovereign or nonsovereign in character.
16. See notes 13 and 14.

Whatever solution prevails, a final point is worth noting. Since the new decree-law must be applied within the context of the French law as a whole, it may happen that certain principles of that law, especially in the field of conflict of laws, will limit the scope of the decree-law. A practical example may be found in the effect of French public policy on the enforcement in France of a foreign award. It is by no means inconceivable that bondholders, especially those of a minority which failed to block the passage of a resolution referring an existing dispute to arbitration, might object to the enforcement of the award in France on the ground of public policy. The application of that doctrine by the French Supreme Court in recent cases concerning resolutions passed by bondholders' associations in other matters, shows that this possibility is by no means remote.[17] Against this eventuality there is unfortunately no really effective remedy since it is impossible to foresee when and to what extent public policy may interfere with future arbitral awards under the 1955 decree-law.

17. Thus, the French Supreme Court refused to enforce, on the ground of public policy, a Portuguese judicial decision approving an agreement between French bondholders and a Portuguese company waiving a gold clause and authorizing the company to issue preferential bonds. Cass. March 22, 1944, Chemins de Fer Portugais v. Ash, Sirey 1945.1.77, Revue 1940-46, 107. See Nadelmann, "Composition—Reorganization and Arrangements—in the Conflict of Laws," 61 Harv. L. Rev. 804 (1948).

INTERNATIONAL ARBITRATION NOTES

EDITOR'S NOTE: *Following is a round-up of incidents and developments in international economic arbitration during* 1955 *of which, we believe, our readers will be interested in having a permanent record.*

Air Transport Agreements

Modern preoccupation with speed and international comunications has led to a number of bilateral air transport agreements between countries. One of the latest, dated July 5, 1955, was negotiated between the United States and the Federal Republic of West Germany. Provision for settlement of disputes is covered in Article 13, which reads:

"(1) Except as otherwise provided in this Agreement, any dispute between contracting parties relative to the interpretation or application of this Agreement which cannot be settled through consultation shall be submitted for an advisory report to a mixed commission of three members, one to be named by each contracting party, and the third to be agreed upon by the two members so chosen, provided that such third member shall not be a national of either contracting party. Each of the contracting parties shall designate a member within two months of the date of delivery by either party to the other party of a diplomatic note requesting settlement of a dispute; and the third member shall be agreed upon within one month after such period of two months.

(2) If either of the contracting parties fails to designate its own member within two months, or if the third member is not agreed upon within the time limit indicated, either party may request the President of the International Court of Justice to make the

necessary appointment or appointments by choosing the member or members.

(3) The contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. Each contracting party shall bear the expenses arising out of the activity of its member as well as one half of the expenses arising out of the activity of the third member."

One of the few international civil aviation disputes which approached the arbitration stage involved India and Pakistan and concerned the former's claim that the latter barred planes from making non-traffic stops in West Pakistan in violation of agreements. As a result, it was alleged, Indian civil aircraft had to make long detours and carry sufficient fuel for return trips in flights between India and Afghanistan. Furthermore, it was charged that Pakistanian prohibitions were unreasonable in that access to forbidden territory was allowed in the case of Iranian planes. The Council of the International Civil Aviation Organization, to which the dispute had been referred as a matter requiring interpretation of Article 9 of the Chicago Convention on International Civil Aviation of December 7, 1944, was assigned to a working group composed of representatives of Belgium, Brazil, Canada, Denmark and Mexico. Investigation led to certain concessions and facilitated an amicable settlement by negotiations on the eve of the arbitration step provided for in the Convention.

Arbitration in Bilateral Treaties

Seven treaties of "Friendship, Commerce and Navigation"—with Denmark, Greece, Ireland, Israel, Italy, Japan and West Germany—have been concluded in recent years by the U. S. State Department and all have met the approval of the U. S. Senate. Three further treaties of more recent date—with Haiti, Iran and Nicaragua —await action in the Senate. All these treaties provide for reciprocal enforcement of arbitration agreements and awards regardless of the place of arbitration or the nationality of the arbitrators. Article V(2) of the treaty with Nicaragua, dated January 21, 1956, reads as follows:

"Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party,

that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party."

Activity of Arbitration Organizations Abroad

A Commercial Arbitration Association of the Republic of China was established in 1955 in Taipei, Formosa, with the stated intent of finding fair and equitable solutions to domestic and foreign trade disputes. To this end, the new Association will attempt to coordinate its activities with those of other international commercial arbitration groups. The Commercial Arbitration Association of China reports a registered membership of 60 organizations, including local and national chambers of commerce, government and private enterprises engaged in foreign trade, the Bank of China, the Central Trust of China, the Taiwan Supply Bureau and several shipping companies. It may be recalled that a China Trade Arbitration Association, sponsored by leading industrial, commercial and professional organizations in that country, was formed in Shanghai in 1946. A report by the organization's Secretary-General, Wei Wen-han, and the text of the Association's arbitration rules appeared in *The Arbitration Journal*, Volume 3, p. 86 (1948).

The International Chamber of Commerce recently revised its Rules of Conciliation and Arbitration to facilitate speedy and inexpensive settling of international trade disputes. The new rules were approved by the XVth Congress of the Chamber in Tokyo in May 1955 and have been in effect since June 1. One of the changes made, at the suggestion of American businessmen, affected the schedule of fees for arbitration. Copies of the Rules are available from the U. S. Council, International Chamber of Commerce, 103 Park Avenue, New York or from the American Arbitration Association, 477 Madison Avenue, New York.

INTERNATIONAL ARBITRATION NOTES

The Italian Chamber of Arbitration in Genoa established new rules for arbitration of disputes growing out of trade in foreign hides and skins. These rules, which apply not only in domestic trade but also to contracts with parties abroad, govern proceedings before the independent arbitration agency at the seat of the Produce Exchange in Genoa.

Arbitration is an essential feature in an agreement between the United States and Bolivia designed to protect American investments abroad by guaranteeing conversion of earnings into dollars and protection against losses through expropriation. This document, dated September 24, 1955, follows the pattern of similar agreements arrived at with other Republics in the Western Hemisphere. Any claim which cannot be settled directly by the governments concerned within a reasonable period of time, will be "referred for final and binding determination to a sole arbitrator selected by mutual agreement. If the Governments are unable, within a period of three months, to agree upon such selection, the arbitrator shall be one who may be designated by the President of the International Court of Justice at the request of either Government."

The International Finance Corporation, set up by the International Bank for Reconstruction and Development to stimulate investment of private capital abroad, provides for arbitration in Article VII (c) as follows:

> "Whenever a disagreement arises between the Corporation and a country which has ceased to be a member, or between the Corporation and any member during the permanent suspension of the Corporation, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators, one appointed by the Corporation, another by the country involved and an umpire who, unless the parties otherwise agree, shall be appointed by the President of the International Court of Justice or such other authority as may have been prescribed by regulation adopted by the Corporation. The umpire shall have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto."

Financial Agreements

The International Bank for Reconstruction and Development, under its Loan Regulations 3 and 4, has concluded a number of agreements with member governments, the most recent of which were with Peru, Colombia and Norway. In brief, these agreements provide for settling of disputes through three-member arbitration boards, composed of one appointed by the bank, another by the borrower and the third, called an umpire, by the two party-appointed arbitrators. Where they cannot agree, the umpire will be named by the President of the International Court of Justice or, failing that, by the Secretary-General of the United Nations. Adequate provision is made for filling vacancies on arbitration boards and for decision by a majority. Section 7.04 (k), dealing with enforcement of awards, reads as follows:

> "If, within 30 days after counterparts of the award shall be delivered to the parties, the award shall not be complied with, any party may enter judgment upon, or institute a proceeding to enforce, the award in any court of competent jurisdiction against any other party, may enforce such judgment by execution or may pursue any other appropriate remedy against such other party for the enforcement of the award, the provisions of the Loan Agreement or the Bonds. Notwithstanding the foregoing, this Section shall not authorize any entry of judgment or enforcement of the award against the Guarantor except as such procedure may be available against the Guarantor otherwise than by reason of the provisions of this Section."

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under five headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *The Proceedings,* VI, *The Award.*

I. THE ARBITRATION CLAUSE

AGREEMENT TO PERMIT AN ATTORNEY TO DETERMINE PROPER FEE TO BE PAID ANOTHER LAWYER CONSTITUTES A BINDING ARBITRATION AGREEMENT. The Supreme Court of Florida affirmed a judgment of a lower court which had been entered upon the award, the Supreme Court stating that the arbitrator "was thoroughly familiar with the services performed, knew the parties and was competent to determine the fee. His determination of the fee under the circumstances is binding upon the appellants." This finding is strengthened, the court said, "by the time honored rule that an award made by the person mutually agreed upon in the event of a dispute will not be disturbed except under a clear case warranting the overthrow of an award." *Causeway Loan Co., Inc. v. Bucklew,* 81 S. 2d 212 (Supreme Court of Florida, June 17, 1955, Terrell, J.).

PARTY TO A CONTRACT IS BOUND BY ARBITRATION CLAUSE DESPITE CLAIM OF INABILITY TO READ ENGLISH. Said the court: "It was his duty to have the contract read to him before he signed it. He is bound by the contract he signed (Pimpinello v. Swift & Co., 253 N.Y. 159, 162)." *Magid-Robinson Co. v. Shalom & Co.,* N.Y.L.J., Oct. 26, 1955, p. 8, Aurelio, J.

ARBITRATION WILL NOT BE DIRECTED WHEN SELLER DESTROYED CONTRACT AND MADE LARGER SHIPMENT THAN WAS ORDERED, ALONG WITH NEW CONTRACT, where buyer refused to accept unordered portion of shipment and returned the new contract unsigned. Retention of goods originally ordered was deemed to have been pursuant to a subsequent oral agreement. *Puritan Fabrics v. Putnam Mills Corp.,* N.Y.L.J., June 2, 1955, p. 7, Wasservogel, Special Referee.

RETENTION OF CONFIRMATION OF ORDER, INCLUDING ARBITRATION CLAUSE, AND OTHER PERFORMANCES IN ACCORDANCE WITH THAT CONFIRMATION CONSTITUTED A BINDING AGREEMENT TO ARBITRATE despite the fact that buyer did not sign and return confirmation. Said the court: "Petitioner in accepting and paying for deliveries under the mill order number listed in the confirmation order and by making changes in the order and issuing shipping instructions for the goods adopted the arbitration provision in the confirmation order and is bound thereby." *Nina Dell Fashions v Woodward, Baldwin & Co.*, N.Y.L.J., Dec. 28, 1955, p. 8, McGeehan, Official Referee.

REFERENCE TO STANDARD FORM OF THE AMERICAN INSTITUTE OF ARCHITECTS IN A CONSTRUCTION CONTRACT DOES NOT CONSTITUTE AN AGREEMENT TO ARBITRATE WHERE PARTY TO CONTRACT WAS NEITHER AWARE NOR INFORMED OF THE ARBITRATION CLAUSE AND WHERE CLAIMS AGAINST CORPORATION OFFICERS FOR "BREACH OF TRUST" IN CONSPIRING TO CONSTRUCT BUILDING IN AN UNWORKMANLIKE MANNER WAS MADE AGAINST PERSONS WHO ACTED AS FIDUCIARY AGENTS OF THE PLAINTIFFS. Said the court: "Defendants cannot rely upon a contract negotiated with themselves as the source of a contention that plaintiff is obliged to surrender its important right to resort to the courts to redress grievances." *Northridge Cooperative Section No. 1 v. 32nd Avenue Construction Corporation*, 139 N.Y.S. 2d 37 (Jan. 31, 1955, Di Falco, J.), aff'd 286 App. Div. 422 (First Dep't. June 28, 1955, Callahan, J.).

CORPORATION OFFICERS, DIRECTORS AND STOCKHOLDERS NOT SUBJECT TO ARBITRATION CLAUSE AS INDIVIDUALS, under the corporation's agreement for joint venture which also provided that officers, directors and stockholders were bound by it. A petition for arbitration against those persons was dismissed inasmuch as plaintiff was not a party "aggrieved" within the meaning of art. 4 of the Federal Arbitration Act, by the refusal of the respondents to become parties to an arbitration. *General Commodities Corp. v. Hyman-Michaels Co.*, 224 F. 2d 952 (Ninth Cir., Aug. 15, 1955, Denman, C. J.).

II. THE ARBITRABLE ISSUE

DISPUTE OVER RIGHT OF EMPLOYER TO DISCONTINUE A PLANT AND TRANSFER WORK TO A WHOLLY-OWNED SUBSIDIARY IN ANOTHER STATE IS NOT ARBITRABLE despite contract which bars lock-out of employees and limits right to subcontract work "to other firms." The court held that "a different question might be presented if respondent had not discontinued its Brooklyn plant, and if it were having work done 'by other firms'; that is, by firms other than itself or its wholly-owned subsidiaries." *Acme Backing Corp. v. District 65, Distributive, Processing and Office Workers of America*, N.Y.L.J., Dec. 20, 1955, p. 3, Benvenga, J.

GRIEVANCES OVER WAGES, HOURS AND WELFARE PLAN ARE ARBITRABLE under broad arbitration clause referring to "any dispute concerning the interpretation or application of any section or sections of this agreement," where several sections of the contract dealt with the subject matter of the grievances. *Amalgamated Assoc. of Street, Electric Railway & Motor Coach Employees of America, Div. 85 v. Pittsburgh Railways Co.*, 25 L.A. 304 (Pa. Ct. of Common Pleas, Allegheny County, October 1955, O'Brien, J.).

DISPUTE OVER WHETHER CERTAIN TERMS WERE INCORPORATED IN CONTRACT IS ARBITRABLE where parties, as the court said, "had a contract containing an arbitration clause under which both parties acted in carrying out their transactions." The Appellate Division, in reversing an order below, therefore denied a motion to stay arbitration. *Continental Nut Co. v. Bennar Candy Manufacturing Corp.*, 286 App. Div. 1088, 146 N.Y.S. 2d 143 (Nov. 29, 1955).

DISPUTE OVER REFUSAL TO DELIVER CERTIFICATES OF COMPLETION OF ELECTRICAL WORK PENDING PAYMENT OF CERTAIN SUMS BY CONTRACTOR IS ARBITRABLE under a clause providing that "all questions that may arise under this contract and in the performance of the work thereunder shall be submitted to arbitration at the choice of either of the parties hereto." *Matter of Westbank Const. Corp.*, N.Y.L.J., Nov. 21, 1955, p. 14, Cone, J.

STOCKHOLDER OF CLOSE CORPORATION MAY INVOKE ARBITRATION TO SEEK REMOVAL OF CORPORATE OFFICERS AND DIRECTORS FOR MISCONDUCT DESPITE UNANIMITY AGREEMENT WHERE OTHER REMEDIES DO NOT EXIST. Appellate Division observed that a need had developed "to resolve disputes among the members of a close corporation, without destroying the corporation or forcing a dissolution. A dissolution may be to the disadvantage of the member who is not, or may not be, in funds to bid for the assets at the corporate sale. . . . An attempted answer has been supplied by lawyers for businessmen who have included broad arbitration clauses in the stockholders' agreements." The denial of a stay of arbitration was therefore affirmed in a majority decision of the Appellate Division, which further said: "The parties have chosen arbitration as the forum with respect to a justiciable issue; and it is neither wise nor just to preclude them from their own choice of forum selected before the occasion for litigation arose. . . . Businessmen and their lawyers are entitled to resort to arbitration as a mode of relief, the issues being justiciable, and therefore, arbitrable." *Burkin v. Katz*, 286 App. Div. 740 (First Dept., Dec. 13, 1955, Breitel, J.).

DISPUTE OVER SALE OF INTEREST IN A JOINT VENTURE FOR THE PURCHASE OF LAND IN FLORIDA IS ARBITRABLE UNDER BROAD ARBITRATION CLAUSE covering disputes on "any matter affecting venture." *Binkow v. Brickman*, 145 N.Y.S. 2d 530 (Sept. 26, 1955, Morrissey, J.).

CLAIM OF MISREPRESENTATION IS ARBITRABLE BEFORE TRIBUNAL NAMED IN GENERAL ARBITRATION CLAUSE, RATHER THAN BEFORE MUTUAL ADJUSTMENT BUREAU, which was named to settle controversies concerning the "condition or quality of merchandise." *Dexter Woolen Corp. v. Lou Schneider, Inc.*, N.Y.L.J., Dec. 16, 1955, p. 5, Levey, J.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

COURT ACTION STAYED PENDING DETERMINATION AS TO WHETHER FEDERAL ARBITRATION ACT APPLIES. A rate agreement between a shipper and a Swedish steamship line contained an arbitration clause referring to the U. S. Arbitration Act. Court action was begun by the shipper to recover an overpayment in the amount of $2,643.54, the shipper claiming that the Federal Arbitration Act did not apply because less than $3,000 was involved. The Supreme Court, Appellate Term granted a stay of court action, the court holding that even if the Federal Arbitration Act was held inapplicable, the arbitration provision would be held subordinate and separable and that the court would not defeat the main purpose of the parties in binding themselves to arbitrate. (Arb. J. 1955, p. 166). Appellate Division affirmed this decision inasmuch as New York courts might still decide to enforce arbitration even if the Federal Arbitration Act was held not to apply. Said the court: "By staying the action, we are not with finality enforcing the arbitration agreement; we are merely preserving the status of the parties until appropriate remedies may be pursued. . . . Our relationship to a controversy which may be arbitrable under the federal law is somewhat closer and our duty to assist the process more imperative than the aid we might lend to a foreign arbitration." *Parsons & Whittemore, Inc. v. Rederiaktiebolaget Nordstjernan*, 286 App. Div. 553, 145 N.Y.S. 2d 466 (Nov. 7, 1955, Bergan, J.).

PENNSYLVANIA ARBITRATION STATUTE APPLIES TO COLLECTIVE BARGAINING AGREEMENTS. Court held that to exclude such agreements as contracts for "personal services" would be "untenable." This decision follows Pennsylvania cases of *Goldstein v. Intl. Ladies Garment Workers Union*, 328 Pa. 385 (1938), *Westinghouse Airbrake Co. Appeal*, 166 Pa. Super. 91 (1950); *Warehouse Men's Local v. Kroger Co.*, 364 Pa. 195 (1950); and *Garment Workers Union v. Nazareth Mills Co.*, 22 L.A. 262 (1954). *Amalgamated Assoc. of Street, Electric Railway & Motor Coach Employees of America, Div. 85 v. Pittsburgh Railways Co.*, 25 L.A. 304 (Pa. Ct. of Common Pleas, Allegheny County, October 1955, O'Brien, J.).

ARBITRATION DIRECTED UNDER COLLECTIVE BARGAINING CONTRACT despite claim by employer that he was caught in jurisdictional dispute between two unions, where validity of the contract had been upheld by courts and state labor relations board. *Suburban-in-Hewlett v. Sackman*, N.Y.L.J., Dec. 21, 1955, p. 9, Christ, J.

ARBITRATION STAYED WHERE PRECEDING STEPS OF GRIEVANCE PROCEDURE HAD NOT BEEN COMPLIED WITH despite union's allegation that by-passing of grievance steps has been the custom. "It is a matter of record," said the court, "that the contract may not be varied except by some written modification executed by the parties to the contract." *Washington Metal Spinning Corp., v. Metal Spinners and Silver-Plated Hollow-Ware Workers Union, Local 49,* N.Y.L.J., Dec. 20, 1955, p. 9, Christ, J.

ARBITRATION DIRECTED WITHOUT REGARD TO GRIEVANCE PROCEDURE AFTER TERMINATION OF CONTRACT, the court holding that grievance procedure could be called into operation only during term of contract and not after bargaining relationship between union and company was terminated. *Kelly v. Samuel Adler, Inc.,* N.Y.L.J., Oct. 10, 1955, p. 7, Nathan, J.

ARBITRATION OF SEVERANCE PAY DISPUTE DIRECTED DESPITE FACT THAT STRIKE MAY HAVE BREACHED COLLECTIVE BARGAINING AGREEMENT AND THAT CONTRACT MAY HAVE TERMINATED. (Appellate Division reversed decision, digested Arb. J. 1955, p. 163). *Potoker v. Brooklyn Eagle,* 286 App. Div. (1st Dept., Dec. 13, 1955, Cox, J.).

COURT STAYS ARBITRATION DEMANDED BY UNION WHERE EMPLOYEES IN UNIT INVOLVED VOTED NOT TO SUBMIT DISPUTE TO ARBITRATION. Dispute involved discharge of a copyreader of a newspaper who had invoked Fifth Amendment before a Senate Committee. The court held that "to permit the executive committee, as agent, to act contrary to the mandate" of the employees in the newspaper concerned would be a "grave injustice" and a "breach of the duty of 'undivided loyalty' which an agent owes his principal." *New York Times Company v. Newspaper Guild of N. Y. Local 3, C.I.O.,* N.Y.L.J., Dec. 14, 1955, p. 7, Benvenga, J.

ARBITRATION DIRECTED DESPITE EMPLOYER'S CLAIM THAT HIS AGENT HAD NO AUTHORITY TO NEGOTIATE AN AGREEMENT INCLUDING AN ARBITRATION CLAUSE where employer's actions subsequent to writing of the contract "unmistakably point to ratification of the agent's acts." Among such actions was participation in and ratification of a previous arbitration award. *Kzwarsuan v. Independent Union of Service Employees,* N.Y.L.J., Dec. 5, 1955, p. 7, Levey, J.

COURT ACTION BY EMPLOYEES FOR DECLARATORY JUDGMENT ON OVERTIME PAYMENTS NOT STAYED UNDER FLORIDA LAW which denies enforcement of future arbitration clauses as "contrary to public policy and obnoxious to the law in that it seeks to oust courts of jurisdiction." Furthermore, the court said, the arbitration clause was not clearly an agreement to arbitrate future disputes, the clause reading: "Should any complaint, dispute or grievance not be adjusted as settled the services of the United States Conciliation Service should be requested by both the Employer and the Union." *Flaherty v. Metal Products Corp.,* 25 L.A. 314 (Supreme Court of Florida, October 19, 1955, Allen, J.).

COURT WILL NOT DIRECT A THIRD PARTY TO PARTICIPATE IN ARBITRATION BETWEEN TWO OTHER PARTIES DESPITE FACT THAT THIRD PARTY HAS A CONTRACT, CONTAINING ARBITRATION CLAUSE, WITH ONE OF THOSE PARTIES. In granting a stay of arbitration, the court said: "The mechanics of third party procedure is not applicable to an arbitration proceeding. A party under contract with another, containing a provision for arbitration, may not be required to join an arbitration demanded of the other party by its contracting party under a separate contract likewise containing a provision for arbitration." The court referred to the case of Prima Products v. Aquella Products, 304 N. Y. 619, (digested in Arb. J. 1952, p. 176). *Selmor Fabrics v. Slater, Lion-Gene Textile v. Tannenbaum Textile Co.*, N.Y.L.J., Nov. 1, 1955, p. 6, Aurelio, J.

ARBITRATION MAY NOT BE DEMANDED BY AN AGENT OF A DISCLOSED PRINCIPAL where the contract clearly indicated that the agent was acting in behalf of a named mill any more than the buyer could enforce arbitration against such agent. *Carlton Mfg. Co. v. Deering, Milliken & Co., Inc.*, N.Y.L.J., Dec. 16, 1955, p. 5, Levey, J.

NOTICE BY EMPLOYER OF INTENTION TO ARBITRATE "TO DETERMINE THE RIGHT OF THE COMPANY TO INSTITUTE AN INCENTIVE PAY PLAN" was sufficient to apprise the union of question sought to be arbitrated. Application by union for an order vacating notice to arbitrate was denied, the court holding that adequate notice was given under a clause referring to arbitration all differences or grievances not settled in grievance procedure. *Fay v. Farber & Schlevin*, 145 N.Y.S. 2d 722 (June 16, 1955, Beckinella, J.).

SUBCONTRACTOR'S ACTION FOR DECLARATORY JUDGMENT TO DETERMINE HIS LIABILITY TO INDEMNIFY CONTRACTOR FOR PARTIAL PAYMENT OF DAMAGE CLAIM STAYED PENDING ARBITRATION WHICH WAS PROVIDED IN CONSTRUCTION CONTRACT. *Sterling Foundations v. Merritt-Chapman & Scott Corp.*, 134 F. Supp. 327 (E.D. N.Y. September 28, 1955, Galston, D. J.).

ACTION FOR DAMAGES BASED UPON ALLEGATION THAT CONTRACT WAS OBTAINED BY FRAUD CONSTITUTES WAIVER OF RIGHT TO ARBITRATE IN ACCORDANCE WITH ARBITRATION CLAUSE IN THAT CONTRACT. By interposing an answer which besides general denial set forth a counterclaim and requested affirmative relief, the defendants also abandoned the arbitration provision, which thereby became ineffective. *Tobin v. Beck*, N.Y.L.J., November 18, 1955, p. 7, Benvenga, J.

RIGHT TO ARBITRATE WAS NOT WAIVED WHEN CONTRACTORS REQUESTED DECLARATORY JUDGMENT against their subcontractor and their surety in the event it would finally be determined that contractors were not entitled to arbitrate because of fraud in obtaining the contract. *McElwee-Courbis Const. Corp. v. Rife* (D.C. M.D. Pa., Aug. 5, 1955, Follmer, D. J.).

PARTICIPATION IN COURT IN DEFENSE OF AN ACTION "UNTIL THE EVE OF THE TRIAL" CONSTITUTES WAIVER OF RIGHT TO ASSERT ARBITRATION CLAUSE AS A BAR TO COURT ACTION. The court referred to Simadiris v. Hotel Waldorf Astoria Corp., 281 App. Div. 665, digested in *Arb. J.* 1953 p. 53. *Di Cesare & Monaco Concrete Const. Corp. v. Forest Hills Leasing Corp.*, N.Y.L.J., Nov. 17, 1955, p. 13, Pette, J.

COURT WILL NOT STAY ACTION TO RESCIND CONTRACT CONTAINING ARBITRATION CLAUSE WHERE THE ACTION IS BASED UPON ALLEGATION THAT CONTRACT WAS INDUCED BY FRAUD. The court, rather than arbitration, was held to be the proper place for determination of validity of contract. *Epstein v. Guber*, N.Y.L.J., June 14, 1955, p. 12, Beckinella, J.

ACTION TO COMPEL ARBITRATION IS THE REMEDY FOR LITIGATION ALLEGEDLY BROUGHT IN VIOLATION OF ARBITRATION AGREEMENT. Court held that a motion to stay court action pending arbitration was inappropriate, the remedy lying in "a proceeding to compel arbitration wherein a stay of the action may be sought." *George Hess Co. v. F. Schumacher & Co.*, N.Y.L.J., Nov. 14, 1955, p. 8, Lynch, J.

IV. THE ARBITRATOR

COURT WILL NOT APPOINT AN ARBITRATOR WHERE THE CONTRACT NAMES A SPECIFIC PERSON "as sole arbitrator whose decision shall be final." In denying a motion by a party to stay arbitration and appoint someone other than the person named in the contract because of his alleged bias, the court said it was assumed that the named arbitrator would perform his duties properly. "If he does not, it will be the basis to set aside the award which he may make." *Schwartz v. Janssen*, N.Y.L.J., April 27, 1955, p. 8, Hecht, J.

NEW YORK COURTS MAY APPOINT IMPARTIAL ARBITRATOR WHERE PARTY-APPOINTED ARBITRATORS FAIL TO NAME THIRD MEMBER OF BOARD, under Sec. 1452, N. Y. C. P. A. The provisions of this section, said the court, "are read into every arbitration agreement made in this state, as an implied term of the engagement . . . and are available to the parties to an arbitration agreement, in the absence of provision therein to the contrary." *Application of Zitner*, 286 App. Div. 1020, 140 N.Y.S. 2d 505 (2d Dept., Oct. 10, 1955; Murphy, J., dissenting).

PRIVATE CONSULTATIONS BETWEEN PARTY-APPOINTED ARBITRATOR AND THAT PARTY'S ATTORNEY ON MATTERS AFFECTING ARBITRATION PROCEEDINGS WITHOUT KNOWLEDGE OF OTHER SIDE CONSTITUTED MISCONDUCT LEADING TO VACATION OF AWARD since the other party was deprived of opportunity to controvert matters which might be prejudicial to his case. *Spitzer Electric Co. v. Fred Girardi Const. Corp.*, N.Y.L.J., Nov. 9, 1955, p. 15, Supple, J.

COURT WILL NOT REMOVE ARBITRATOR DURING HEARING FOR ALLEGED MISCONDUCT IN THAT ONE ARBITRATOR EXAMINED A FEW OF 1700 SEWING MACHINES WHICH WERE THE SUBJECT OF DISPUTE, WHILE A SECOND ARBITRATOR EXAMINED DIFFERENT MACHINES AND THE THIRD, COURT-APPOINTED ARBITRATOR EXAMINED NONE. The court held that this was not ground for removing the first arbitrator. Said the court, distinguishing Berizzi v. Kraus, 239 N.Y. 315, "the condition of the record at the termination of the hearing may be such as to warrant the court in concluding that no prejudice resulted to the party against whom the award may be made." *State Sewing Machine Corp. v. Regis Trading Co., Ltd.*, N.Y.L.J., Nov. 29, 1955, p. 8, Benvenga, J.

SUBPOENAS ISSUED BY ARBITRATOR ARE VALID WHEN THEY DESCRIBE DOCUMENTS TO BE PRODUCED "WITH A SUFFICIENT DEGREE OF PARTICULARITY" and when they are relevant and material to the subject matter before the arbitrator. *Re-Anne Mfg. Corp. v. Reisman Coat Corp.*, N.Y.L.J., Dec. 29, 1955, p. 5, Matthew M. Levy, J.

ACCOUNTANTS SELECTED IN STOCKHOLDERS' AGREEMENT FOR DETERMINATION OF CORPORATION EARNINGS DID NOT ACQUIRE STATUS OF ARBITRATORS such as to invest them with judicial immunity for alleged negligence in performance of their services inasmuch as the agreement did not call upon them to exercise "judicial authority." The court said that since the accountants were not themselves parties to the agreement they may not "now resort to it as a means of escape from the normal obligations applicable in an employment contract for accounting services." *Gammel v. Ernst & Ernst*, 72 N. W. 2d 364 (Supreme Court of Minnesota, July 15, 1955, Gallagher, J.).

V. THE PROCEEDINGS

TIME LIMIT OF FOURTEEN DAYS WITHIN WHICH CLAIM OF LATENT DEFECTS MUST BE MADE DOES NOT BAR ARBITRATION AFTER EXPIRATION OF TIME LIMIT since the limitation did not refer to the time "within which *arbitration* must be demanded." *Towanda Silk Corp. v. S. Makransky & Sons*, N.Y.L.J., Dec. 5, 1955, p. 8, Benvenga, J.

NOTICE TO STAY ARBITRATION MAY BE SERVED ON ATTORNEY RATHER THAN PRINCIPAL WHERE NOTICE OF INTENTION TO ARBITRATE HAD BEEN GIVEN BY THAT ATTORNEY. *Application of Katz*, 146 N.Y.S. 2d 332 (Nov. 15, 1955, Matthew M. Levy, J.).

TEMPORARY STAY OF ARBITRATION DENIED DESPITE CLAIM THAT ONE OF GROUPS OF EMPLOYEES CONCERNED HAD NO KNOWLEDGE OF PROCEEDINGS AND WERE NOT PARTICIPATING where granting of such temporary stay of arbitration "could well result in waterfront disruption." *Cuff v. New York Shipping Association*, N.Y.L.J., Oct. 10, 1955, p. 6, Aurelio, J.

DEMAND FOR ARBITRATION MUST INDICATE THE NATURE OF THE DISPUTE. A notice of arbitration which merely stated that the party "intends to conduct an arbitration with respect to controversies arising under a contract . . . covering the sale and purchase of textile fabrics," was held insufficient. Motion to stay arbitration was granted without prejudice to serve another notice adequately stating the controversies as sought to be arbitrated. *Jennie Saifer & Co. v. Tanbro Fabrics Corp.*, N.Y.L.J., Dec. 8, 1955, p. 7, Levey, J.

DEMAND FOR ARBITRATION NEED NOT SPECIFY CONSEQUENCES OF FAILURE OF A PARTY TO ACT, the court stating that the case of Schafran & Finkel v. Lowenstein & Sons, 280 N.Y. 164, upon which the plaintiff relied, "has been rendered inapplicable by the 1939 amendment to sec. 1458 C.P.A. (see MacNamara v. Doubleday, 270 A.D. 645, 647)". *Mesta v. Keedick*, N.Y.L.J., Nov. 30, 1955, p. 8, Renvenga, J.

ARBITRATION PROCEEDING IS VALID DESPITE REFUSAL OF SELLER TO PARTICIPATE on the mistaken but tenable grounds that another tribunal (Mutual Adjustment Bureau of the Cloth and Garment Trade) had sole jurisdiction. The court nevertheless ordered re-hearing before arbitrators inasmuch as the arbitration proceeding took only one day and the arbitrators had not made sure of their jurisdiction in advance. *Kanmak Mills v. Society Brand Hat Co.*, 134 F. Supp. 263 (E.D. Missouri, July 19, 1955, Hulen, D. J.).

PARTICIPATION IN SELECTION OF ARBITRATORS CONSTITUTES WAIVER OF RIGHT TO DISPUTE EXISTENCE OF ARBITRATION CLAUSE UNDER SEC. 1458(1) C.P.A. *Simplex Machine Tool Corp. v. Swind Machinery Co.*, 144 N.Y.S. 2d 595 (Aug. 15, 1955, Streit, J.).

VI. THE AWARD

ARBITRATOR ACTED WITHIN AUTHORITY IN FINDING THAT RESTAURANT OWNER WAS SUBJECT TO AGREEMENT NEGOTIATED BETWEEN UNION AND ASSOCIATION where the restaurant owner had a contract with the union including an arbitration clause and where the arbitrators made finding of fact that the secretary of the association had been authorized by the owner to represent him in negotiations. Said the court: "Questions of fact and of law and the sufficiency of evidence cannot be reviewed by the courts." *Los Angeles Local Joint Executive Board of Culinary Workers and Bartenders, AFL v. Stan's Drive-Ins, Inc.* 288 P. 2d 286 (Dist. Court of Appeals, Second Dist., California, Oct. 11, 1955, Vallee, J.).

AWARD UPHELD AND ARBITRATOR'S AUTHORITY TO RULE ON FACTS CONFIRMED despite claim of union that award was "self contradictory." Award had denied wage increase to maintenance mechanics whose job title was changed to machine rebuilders, the award being based on the

theory that maintenance mechanics had been machine rebuilders in fact and that change in title did not amount to a reclassification from one labor grade to another. The award was therefore confirmed. *Haberlack v. Fairchild Camera & Instrument Corp.*, N.Y.L.J., June 13, 1955, p. 6, Cox, J.

ARBITRATOR IS SOLE JUDGE of FACTS, LAW AND RELEVANCE OF EVIDENCE. A court declined to review merits of an arbitration award which was challenged on the ground that a majority of the arbitration board refused to reopen hearings for the purpose of receiving further proof as to the meaning of the so-called "celanese test." The majority had held that such proof could have no effect on the award. Said the court: "The parties selected the arbitrators to determine the facts and the law applicable to their controversy. They chose for the determination of their legal rights and obligations a forum where no strict rules of evidence are observed and they are bound by their choice." *Johnston v. Princeton Worsted Mills*, 144 N.Y.S. 2d 259 (Aug. 1, 1955, Stevens, J.).

AWARD CONFIRMED DESPITE DENIAL OF AN AGREEMENT TO ARBITRATE WHERE OBJECTING PARTY PARTICIPATED IN PROCEEDINGS (sec. 1458 C.P.A.). *Hicksville Lumber Corp. v. Gentile*, N.Y.L.J., Jan. 26, 1956, p. 7, Hofstadter, J.

AWARD MAY BE VACATED WHEN IMPARTIAL ARBITRATOR TESTIFIES HE SIGNED IT WITHOUT UNDERSTANDING ITS EFFECT. *Martin Weiner Co. v. Fred Freund Co.*, N.Y.L.J., Jan. 24, 1956, p. 7, Lupiano, J.

AWARD DIRECTING EMPLOYER TO REINSTATE EMPLOYEES DISCHARGED FOLLOWING REFUSAL TO TESTIFY BEFORE A CONGRESSIONAL COMMITTEE WILL NOT BE ENFORCED WHERE UNION MAKES ALLEGATION OF UNFAIR LABOR PRACTICE, OVER WHICH THE NLRB HAS EXCLUSIVE JURISDICTION. In prosecuting the grievance through arbitration, the union alleged that the company was committing an unfair labor practice in that it was unilaterally setting new conditions of continued employment. Said the court in vacating the award: "Here the union has chosen to make the alleged refusal to bargain an essential element of its argument that the suspension and discharge of Parker and Salter was improper. This makes the matter one exclusively for the National Labor Relations Board and not within the jurisdiction of the board of arbitration or of this court." *United Electrical, Radio and Machine Workers of America (UE) Amalgamated Local 259 v. Worthington Corporation (Holyoke Works)*, D.C. Mass. Civil Action No. 55-337F, Dec. 5, 1955, Ford, D. J.

AWARD CONFIRMED DESPITE ERROR IN IDENTIFICATION OF PARTY BY "INC." RATHER THAN "CO.", the court holding this objection to be "unsound" inasmuch as "the contract was between these parties and was recognized as such throughout." *Cohn-Hall-Marx Co. v. Holland*, N.Y.L.J., Jan. 18, 1956, p. 8, Hecht, J.

IMPROPER IDENTIFICATION OF A PARTY DOES NOT INVALIDATE AN AWARD. Said the court: "It is also clear that respondent participated voluntarily in the arbitration proceedings and made no objections that he was not a proper party thereto at any time." *Livingston v. Freier,* N.Y.L.J., Jan. 19, 1956, p. 7, Markowitz, J.

ACCOUNTANTS' EVALUATION OF STOCK CONSTITUTES A BINDING AWARD where parties had agreed to purchase corporate stock at book value, which value was to be determined by accountants. The Supreme Court of Ohio, in upholding the award, said: "It is the policy of the law to favor and encourage arbitration, and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts." *Brennan v. Brennan,* 128 N. E. 2d 89 (Supreme Court of Ohio, July 13, 1955, Stewart, J.).

AWARD PROVIDING FOR RETURN OF MONEY ADVANCED FOR DEVELOPMENT OF PROPERTY CONFIRMED when there was "no intent upon the part of the parties that the refund was in the nature of a penalty, or even liquidated damages." Such award, said the court, "does not in any way offend public policy (Publishers Association v. Newspaper Union, 280 App. Div. 500)." *Compagnie Francaise des Petroles v. Pantepec Oil Co.,* N.Y.L.J., Jan. 13, 1956, p. 7, Markowitz, J.

ARBITRATOR ACTED WITHIN HIS AUTHORITY IN AWARDING ON ADDITIONAL GRIEVANCES FILED BY THE UNION DURING PROCEEDINGS WHERE EMPLOYER DID NOT OBJECT. In refusing to vacate award, court noted that arbitration clause was a broad one which "should be enforced by liberal interpretation," especially where union did not strike or breach contract, but sought remedies in arbitration. *Philadelphia Dress Joint Board v. Rosinsky,* 134 F. Supp. 607 (D.C. E.D. Pa., July 11, 1955, Lord, D. J.).

AWARD VACATED WHEN BASED UPON FALSE TESTIMONY. Sale of kindergarten and nursery was conditioned upon buyer's ability to obtain license to operate in the same manner as seller had done. During arbitration proceeding brought on by failure of buyer to pay notes given as part of purchase price, buyer had concealed the fact that his application for a license to operate was for a different age group. The court held that the buyer's testimony was false and that the award had to be vacated. *Minietz v. Minietz,* N.Y.L.J., Nov. 29, 1955, p. 8, Benvenga, J.

AWARD OF ARBITRATOR CONFIRMED AS WITHIN TIME LIMIT OF 60 DAYS FROM APPOINTMENT UNDER §8159 OF GENERAL STATUTES OF CONNECTICUT WHERE OBJECTING PARTY FAILS TO SHOW THE DATE ON WHICH ARBITRATOR WAS "EMPOWERED TO ACT." *Textile Workers Union of America, C.I.O. v. Uncas Printing and Finishing Co.,* 19 Conn. Sup. 385, 115 A. 2d 473 (Super. Ct. of Conn., Windham County, Feb. 28, 1955, King, J.).

LEGATEE WAS BOUND BY DECISION OF AN APPRAISER ON DIVISION OF LEGACY WHEN HE AGREED TO DO SO IN RETURN FOR A PROMISE BY ANOTHER PARTY NOT TO CONTEST A WILL. *Hunter v. Hunter,* 142 N.Y.S. 2d 296 (Oct. 19, 1954, Ritchie, J.).

INTEREST ON AWARD CANNOT BE COMPUTED FROM AN EARLIER DATE, when arbitrators allowed 10 days within which the amount awarded was to be paid. Although a successful party is generally entitled to interest from the date of the award (*East India Trading v. Halari,* 305 N.Y. 833, digested *Arb. J.* 1953, p. 212), this case was different in that the arbitrators expressly barred application of the general rule. Similarly, no interest could be awarded from date of breach of contract since this the arbitrators determined not to so award. (The App. Div. thus modified the decision below, digested in *Arb. J.* 1955 p. 109). *Penco Fabrics v. Louis Bogopulsky,* N.Y.L.J., Dec. 14, 1955, p. 9 (App. Div. 1st Dept.).

AWARD NOT CONFIRMED PENDING TRIAL TO DETERMINE WHETHER EMPLOYER HAD RESIGNED FROM ASSOCIATION PRIOR TO RENEWAL OF AGREEMENT UNDER WHICH ARBITRATION WAS HAD, WHETHER HE HAD ABSTAINED FROM PARTICIPATION IN ARBITRATION, and whether Association was authorized to represent employer. *Minkoff v. Belle-Maid Dress Corp.,* N.Y.L.J., Dec. 13, 1955, p. 6, Benvenga, J.

AWARD UPHELD DESPITE REFUSAL OF ARBITRATORS TO DIRECT A PARTY TO PRODUCE BOOKS, RECORDS AND BANK ACCOUNTS. In an arbitration to determine whether a distributor was being overcharged as a result of an alleged rebate agreement between an inventor and a manufacturer, the inventor offered to permit examination of his books by accountants to be designated by the arbitrators. The distributor declined this offer and insisted upon examination of this material in the arbitration itself. The arbitrators did not direct production of books at the arbitration. A lower court had vacated the award but Appellate Division reversed the decision, saying that the inventor's proposal "was a reasonable offer since the petitioners were actual or potential competitors of the respondents. The petitioners refused or failed to avail themselves of the offer made." *Seedman v. Lockrey,* 146 N.Y.S. 2d 295 (App. Div. 1st Dept. Dec. 13, 1955).

AN EDITORIAL

(*Continued from Page* 177)

to hear and determine disputes arising in the trade, is a proper and most useful process.

Today the congestion of the court calendars is largely due to automobile accident claims. Why cannot these be referred to arbitration? Have they been referred to arbitration and what has been the result?

Fortunately, there is a record to look back upon. In the early 1930's, the Municipal Court calendars of New York City were congested by such cases. Under the influence of Mayor La Guardia, the President Justice of the Municipal Court with a committee of distinguished lawyers, organized by the American Arbitration Association, surveyed the situation. A report was made and submitted to the Superintendent of Insurance of New York State. A meeting of counsel and claims officers of the insurance companies active in New York City was arranged by the Superintendent and a program for the use of arbitration was presented. In the following few years, a majority of the insurance companies in the city agreed to submit cases pending on the Municipal Court calendar to arbitration. They were filed with the American Arbitration Association and it was asked to undertake the operation of an accident claims tribunal.

It also had an even more difficult task—the education of the plaintiffs' attorneys to use the process.

With funds largely contributed by the lawyers of New York, the work was undertaken and some 18,000 cases were filed with the Association of which more than fifty per cent were arbitrated or settled. Many of the others were dropped as a result of the effort to bring about prompt determination of these disputes.

By the early 1940's the Municipal Court calendars in New York City were up to date. Such a plan might well be put into effect again providing that the bar associations join in the effort and again educate the plaintiffs' attorneys to submit cases to arbitration.

The insurance companies of the United States have long been users of arbitration. Under a system suggested by the American Arbitration Association many years ago, cases in which both plaintiff and defendant are insured are now disposed of throughout the country by special arbitration committees established by the Association of Casualty Underwriters.

In October last, one hundred of the stock companies operating

in New York State extended the coverage of their policies to include the payment of damages for physical injuries caused by the uninsured driver. With the approval of the State Superintendent of Insurance, the rider providing for the extended coverage included a provision, that if the company and the insured were unable to agree upon either the question of negligence or the amount of damages to be paid, the matter would be submitted to arbitration under the accident claims tribunal rules of the American Arbitration Association. No cases have been arbitrated, but the reports from the insurance companies disclose that largely due to the presence of the arbitration clause and the knowledge that the dispute will be promptly heard and determined, all cases to date have been settled by conference between the companies and their insured.

That is not a new experience in arbitration. All through the commercial world where arbitration clauses have become the usual practice, the vast majority of claims made under contracts including such clauses are settled without recourse to the arbitration process.

Surely the experience of the Municipal Courts of New York and the experience of insurance companies generally in the use of arbitration offer a way which should be made use of in the relief of court congestion everywhere.

The creation of new judges, the setting up of special boards, will all add to the tax burden of which all citizens are complaining. Arbitration offers an economical, speedy and just way of settling accident claims without further burdening the taxpayer. The American Arbitration Association is ready to cooperate with Bar Associations throughout the country.

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PUBLICATIONS OBTAINABLE THROUGH THE AMERICAN ARBITRATION ASSOCIATION*

AMERICAN:

Arbitration Bibliography (1954) pp. 100, $2.00

Arbitration Law: A Quarterly Digest of Court Decisions, with Binder and Index, $3.00 per year

Kellor: American Arbitration, Its History, Functions and Achievements (1948), pp. 262, $3.00

Sturges: Cases on Arbitration Law (1953), pp. 912, $9.00

Kellor: Arbitration and the Legal Profession

Code of Ethics and Procedural Standards for Labor-Management Arbitration

Voluntary Labor Arbitration Rules

Braden: Labor Arbitration Procedures and Techniques

Commercial Arbitration Rules

Standards for Commercial Arbitration

Questions and Answers on the American Arbitration Association

"You be the Arbitrator"

Annual Report, 1954

Thirtieth Anniversary Report 1926-1956

INTERNATIONAL:

Foreign Trade Arbitration

Blue Book of Inter-American Commercial Arbitration

Rules of the Inter-American Commercial Arbitration Commission (English and Spanish)

Canadian-American Commercial Arbitration Facilities—Rules of Procedure

Kellor and Domke: Western Hemisphere Systems of Commercial Arbitration

Rules of Conciliation and Arbitration, International Chamber of Commerce

* Unless otherwise noted, literature is available without charge.